the authority of a stationmaster in such a case. I have no doubt that the feeling of humanity, and the professional desire to do the best that he could for his patient, influenced Dr Montgomery very much, and it was very natural for him to suppose that, being called in at first, and having advised whether an operation could not be avoided, he was the person best fitted to continue his attendance; and when he claimed the poor man as his patient he had the feeling that it was his duty to attend him. This, probably, was his motive for claiming him as his patient. But I think he carried that a great deal too far, farther than the law will justify him, and farther than he could reasonably do. His motives may have been all very good, but I am clearly of opinion that in all the circumstances his claim against the Company is unfounded. I agree with your Lordship that this is a case of importance. I have read the whole of it carefully, and the more I consider it the more I am of opinion that the Sheriff-Substitute is right and the Sheriff wrong.

LORD MURE—I concur with your Lordship that the stationmaster has no such implied authority in regard to the employment of medical men as has been maintained here, and on that ground I think the Sheriff's judgment is not sound. It was strongly pushed in argument that the exception about one visit should have been made known to Dr Montgomery; but I think the preponderance of the evidence goes to show that after the conversations spoken to he ought to have satisfied himself that he was entitled to go on making his visits.

LORD SHAND—I am of the same opinion. The stationmaster, under his ordinary employment as such, was certainly not an agent of the company entitled to employ a doctor to give continuous attendance either to a servant of the company or a passenger. That being so, the only question is, whether he had special authority to do so by virtue of the rules on which, in this view, the pursuer must found in order to establish liability? The rules give no greater authority to a stationmaster than to any other servant of the Company, and it appears that the authority here given is limited to employment, we find, for the first visit. It is said that the concluding part of the rule, "that station agents and others will be held responsible for making the doctor acquainted with this regulation,' implies that in the absence of such an intimation to the doctor there is liability for further atendance. But a provision or direction to give an intimation of precaution to prevent any possible misunderstanding cannot be interpreted as extending the power of the agent who fails to give intimation, and I cannot see how the failure to give intimation can infer liability against the Company, who were not bound to give it.

The Court recalled the Sheriff's interlocutor, and pronounced an interlocutor repeating the findings of the Sheriff-Substitute and giving decree of new for £3, 3s., and *quoad ultra* assoilzieing the defenders.

Counsel for Pursuer (Respondent)—Scott—Shaw. Agents—Renton & Gray, S.S.C.

Counsel for Defenders (Appellants)—Balfour. Agent—Adam Johnstone, Solicitor.

Thursday, May 16.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

HERVEY AND ANOTHER (MORRISON'S TRUSTEES) *v.* WEBSTER AND ANOTHER.

Superior and Vassal—Feu-Contract—Singular Successor — Composition — Debitum fundi *— Poinding of the Ground.*

In a feu-contract it was stipulated that sums of entry-money and interest thereupon "should be declared to be real burdens" upon the subjects. *Held* (*diss.* Lord Ormidale, and *rev.* Lord Rutherfurd Clark) that the composition on entry of a singular successor was by contract a *debitum fundi*, and as such recoverable by an action of poinding of the ground, and that the fact of uncertainty as to period of payment did not affect the real nature of the burden on the land.

This action was directed against John Webster, the proprietor, and Mrs Jane Williamson the tenant and occupant, of the subjects 29 Ann Street, Edinburgh, of which the pursuers (1) Archibald Hervey and another, Miss Morrison's trustees, and (2) Archibald Hervey, sole surviving trustee of the Rev. George Craig and Mrs Morrison or Craig, his wife, under their mutual settlement, were immediate lawful superiors, each to the extent of one-half *pro indiviso*. The amount sued for was £50, 8s., in two sums of £25, 4s. each, being the composition payable to the superiors at the death of Mrs Grahame, a former proprietor, who died on 26th July 1872, and a like composition payable on the transfer of the property to the defender Webster, who purchased it from Mrs Grahame's representatives at Whitsunday 1875.

The feu-duty payable under the feu-contract, which was dated 8th November 1820, was £25, 4s. for two lots of ground therein disponed, and there was a provision that the feu-duty should be doubled at the entry of each heir or singular successor, exclusive of the current year's feu-duty. The feu-contract further proceeded as follows:—"Declaring that heirs shall successively enter within six months after the decease of the last vassal so entered and infeft, and the entry-money shall bear interest from the lapse of the said six months till paid, whether demanded or not; declaring also that infeftment shall follow hereon within one month from the date hereof, otherwise this present feu-right shall become null and void, and the said subjects shall thereupon revert to the said Henry Raeburn and his foresaids, any law or practice to the contrary notwithstanding: And also declaring that all purchasers or disponees of the vassals in the said subjects, or any part thereof, shall be obliged to enter by a charter of resignation, . . . and be infeft thereupon within the space of six months from the date of their respective purchases, and that altho' their authors be alive at the time, any law or practice to the contrary notwithstanding; and in case they fail or refuse so to do, then the right of the purchasers or disponees to the said subjects shall become void and

null, and the said subjects so sold or disponed shall thereupon revert, . . . and the entry-money shall bear interest from the lapse of the said six months till paid, whether demanded or not: . . . . Declaring that the said several sums of entry-money shall be payable as often as they become due, whether heirs or singular successors or disponees shall demand the writings necessary for infefting themselves or not, and which sums of entry-money, and interest thereupon, shall be, and are hereby declared to be, real burdens on the said subjects, and that so often as they shall accresce and become due and payable, and may be sued for and recovered *debita fundi.*"

In 1849 Mrs Grahame purchased the house No. 29 Ann Street, which was one of the lots conveyed in the feu-contract, and the title was taken in favour of James Grahame, her husband, and herself in conjunct fee and liferent, for James Grahame's liferent use allenarly, and Mrs Grahame her heirs and assignees whomsoever in fee. They became infeft in the subjects, and by the disposition in their favour the subjects were conveyed, subject to payment of £12, 12s. yearly of feu-duty, the proportion effeiring to the subjects thereby disponed of the feu-duty of £25, 4s. payable by the feu-contract for the whole subjects, with interest and penalty as therein mentioned, and doubling the feu-duty at the entry of each heir or singular successor, exclusive of the current year's feu-duty, and also with and under the declarations, conditions, provisions, restrictions, limitations, and obligations before referred to. Mr and Mrs Grahame were duly entered with the immediate lawful superior by charter of confirmation dated 3d December 1849. By deed of renunciation on 21st February 1872 Mr Grahame renounced his liferent. Mrs Grahame died on 26th July 1872, and her heir or disponees thereupon became bound, within six months from that date, to enter with the pursuers as the immediate lawful superiors of the said subjects, and to make payment to them of the sum of £25, 4s. of entry-money, in accordance with the provisions of the feu-contract. As to this sum the pursuers alleged that they had repeatedly sought payment, but that the Grahames, while admitting their liability, could not pay till the house was sold. The defenders, on the other hand, maintained that the pursuers had expressly waived their right till the property should be sold.

In 1875 Webster purchased the house from Mrs Grahame's representatives. It was stated on record that the usual obligation by a seller to relieve the purchaser of all casualties due and payable prior to the term of the purchaser's entry was not inserted in the disposition of the subjects. The defenders denied that in the treaty for the purchase of the subjects Webster had, as alleged by the pursuers, agreed to make payment of the composition, or to relieve the sellers, and explained that what he had agreed to was that he should not call on the sellers to pay entry-duty, this arrangement not interfering or being intended to interfere with the sellers' obligation to the superiors, or the right of the latter to exact payment from the sellers if they intended to insist on their claim. The composition of £25, 4s. due and payable by Webster himself within six months of his entry was admitted, and the defenders averred that he had repeatedly offered payment thereof.

The pursuers pleaded—"The entry-moneys, with the interest thereon, mentioned in the summons, being justly due and resting-owing to the pursuers as superiors of the said subject, and being *debita fundi*, the pursuers are entitled to decree as concluded for, with expenses."

The defenders pleaded—"(1) The composition or entry-moneys not being in their nature *debita fundi*, nor validly constituted such by the feu-charter of the subjects, the present action of poinding the ground is incompetent, and ought to be dismissed. (2) The pursuers having allowed the defender's predecessors to possess and dispose of the subjects without requiring them to enter or to exact payment from them of the composition which may have been incurred by them, they are not entitled to demand payment of that composition from the defender. (4) The defender is only liable to the pursuers for the composition payable in respect of his own entry to the subjects as a singular successor of his predecessors, and having all along offered to pay that composition, with interest thereon, he is entitled to have the present action dismissed, with expenses."

The Lord Ordinary (Rutherfurd Clark) assoilzied the defenders, adding the following note:—

"*Note.*—This is an action of poinding of the ground. It follows that it is only competent if the sums which the pursuers seek to recover are *debita fundi.* The main defence is that they are not.

"By the feu-contract, under which the pursuers are superiors and the defenders vassals, it is provided that the feu-duty shall be doubled at the entry of each heir or singular successor—that all purchasers or disponees shall be obliged to enter within the space of six months of their respective purchases—and that the entry-money shall bear interest from the lapse of the said six months till paid. The feu is given out under the burden of 'the feu-duty, and other conditions and prestations therein mentioned;' and the feu-contract contains a clause which declares that the several 'sums of entry-money, and interest thereupon, shall be and are hereby declared to be real burdens on the said subjects.'

"It is plain enough that the parties to the feu-contract intended that the entry-money should form a real burden, and the Lord Ordinary is of opinion that, so far as the form of the deed goes, it is sufficient. But the defenders, as singular successors, maintain that sums of money becoming due at uncertain dates, and not ascertainable from the records, cannot be made real burdens on the land.

"The Lord Ordinary has come to be of opinion that the objection of the defender is well founded. He thinks it essential in order to the constitution of a real burden that the full amount of the possible charge shall always be known by the inspection of the record. The apparent charge may be, and often is, greater than the real charge, for the burden may be paid though the record is not cleared. But when a real burden is well constituted, the public should, it is thought, have notice of its greatest possible amount, otherwise they would not be in safety to transact on the faith of the records.

"In this case that condition cannot be satisfied. The entry-money does not become due at periodical fixed periods, as in the case of a feu-duty or ground-annual, but at times which are uncertain, and cannot be ascertained from the record. Hence, if it were held that the entry-money formed a real burden on the subjects, it might, and indeed would, on every sale be charged with burdens of which the record would contain no notice. It is true that there is notice of the possibility of such a charge. But this, it is thought, is not sufficient.

"The Lord Ordinary gives no opinion on the question whether the pursuers can recover the entry-money by another process. He decides nothing more than that it is not a real burden which can be recovered by a poinding of the ground."

The pursuers reclaimed, and argued—A new vassal could not plead that any of the prestations in the feu-contract were merely personal. Whether the composition in question was or was not a casualty did not affect the question. The superior was entitled to poind the ground for everything arising out of his contract with his vassal. Bell had called this composition a casualty. The stipulation in the feu-contract was a legal one, and was a real debt secured to the superior by his infeftment (*Duke of Montrose* v. *Stewart*). If it were a personal obligation, it would be so against the original vassal only (*Allan's Trs.* v. *Duke of Hamilton*). Such a prestation was due to the superior *sua natura*, and naturally belonged to the feu-contract. [Lord Gifford—Do you apply that in the case of an untaxed entry?] Yes. It was one of the *naturalia feudi*, but here the position was better. It was a real burden, not because it was made so by the record, but because the superior retained it by his title anterior to that of the vassal (*Stirling* v. *Ewart*).

The respondents argued—The fact that this was a condition of the feu was not denied, but poinding of the ground was not a competent action whereby to enforce it. [Lord Ormidale—In fact, your case takes the form of a technical objection to the form of action?] That was so. Further, the prestation required to be fixed, both in amount and also in period of payment.

Authorities—Bell's Comm. i. 23 (5th ed.)—M'Laren, i. 23; *Duke of Montrose* v. *Stewart*, March 27, 1863, 1 Macph. (H.L.) 25; Erskine's Inst. ii. 5, secs. 2, 42, 50—iv. 1, sec. 13—ii. 5, sec. 2—ii. 3, sec. 50; Stair, ii. 4, sec. 28; Craig, ii. 20, sec. 36; *Heriot's Hospital* v. *Cockburn Ross*, June 6, 1815, F.C.; *Allan's Trs.* v. *Duke of Hamilton*, 15 Scot. Law Rep. 279; Bell's Pr. sec. 728; *Stirling* v. *Ewart*, Dec. 14, 1842, 4 D. 684, 3 Bell's App. 128; *Allan*, M. 10,265; *Broughton* v. *Gordon* M. 10,247; Elch. Personal Bond, No. 2.

At advising—

Lord Ormidale — This action is one of poinding the ground, and has been brought in order to recover £50, 8s., being the amount of entry-duties owing to the pursuers as the superiors of the heritable subjects referred to in the summons. The entry-duties claimed are not exigible in relief as for the entry of an heir, but as the composition due for the entry of singular successors on two several occasions. The distinction is important.

The Lord Ordinary has assoilzied the defenders on the ground that the entry-duties referred to being in their nature uncertain as regards the dates when they might become due, and as consequently the amount of entry-duties due at any given time could not be ascertained by inspection of the public records, they cannot he held to be real burdens so as to warrant a poinding of the ground. The pursuers have reclaimed against the Lord Ordinary's judgment, which they contend is erroneous, in respect (1st) that the entry-duties in question, being casualties of superiority, are *sua natura* and by law *debita fundi*, and so recoverable by an action for poinding the ground; and in respect (2dly) that, at any rate, they have been made *debita fundi* in the present instance by the agreement or paction of parties.

Now, it is true that, in the words of Mr Erskine (b. iv. t. 1, s. 11), "Every person who has a debt secured upon land, or as it is commonly expressed a *debitum fundi*, whether the security be constituted by law or by paction, is entitled to an action for poinding all the goods on the lands burdened in order to his payment, even though the original debtor should have been divested of the property in favour of a singular successor after granting the creditor's security." The question therefore comes to be, Whether the entry-duties now in dispute are by law *debita fundi*, or at any rate have been made so by paction, that is, by the agreement or contract of parties?

In regard to the first of these grounds upon which a *debitum fundi* may be held as constituted, the composition or relief-duty owing by the heir of a deceased vassal to the superior for an entry to the land held in feu by that vassal stands, I think, in a very different position from that of a composition exigible from a singular successor. The former is inherent in the feudal relation of superior and vassal, and arises to the superior from his original and super-eminent right in the land, with which, to that extent at least, he has never parted—a right in virtue of which, according to feudal theory and principle, land given out and held by a vassal reverts on his death to the superior, and can only be taken up again by the vassal's heirs upon payment to the superior of what is called relief-duty for a renewed entry (Ersk. b. ii. t. 5, s. 47). But a purchaser or other singular successor could not originally, or in accordance with feudal principle, insist for a renewed entry because the vassal had not the power to transfer the land held by him to another (Ersk. b ii. t. 7, s. 5). By various statutes, however, these principles of the feudal law have been innovated upon and relaxed, first in favour of apprisers, who were by Act 1469, cap. 36, declared entitled to demand an entry, but only on payment of "a yeires maill of the lands," and afterwards in favour of adjudgers by Act 1669, cap. 18, and purchasers at judicial sales by Act 1681, cap. 17; but each of these two last Acts gave the right to insist on an entry from the superior only on the same payment as in the case of apprisers, viz., a year's rent. Then, ultimately, by the 20 Geo. II. cap. 58, the right of the superior to control the investiture, or to

refuse to recognise the transmission of lands by a vassal, was taken away, and power given to singular successors, as well as heirs, of enforcing an entry by a charge of horning, it being at the same time declared that the superior is not to be obliged to obey the charge except upon tender of "such fees or casualties as he is by law entitled to receive."

As it thus appears that the entry of singular successors is entirely the creature of statute, and an innovation upon feudal law and principle, I do not well see how it can be maintained that the composition for such an entry is *sua natura* a real burden or *debitum fundi* entitling the superior to sue an action of poinding the ground for its recovery. It is not in any of the Acts to which I have referred declared to be *debitum fundi* or a real burden upon the land; and it appears to me to be of the nature rather of a personal claim which the superior may require to be satisfied before he complies with the demand of a singular successor for an entry. Indeed, when it is kept in view that the statutory amount of a composition for an entry of a singular successor is not a specific or definite sum, but a year's rent, the amount of which can only be ascertained on inquiry, and after making a variety of deductions, in themselves indefinite (Ersk. b. ii. t. 12, s. 24)—an inquiry which may, according to circumstances, be attended with great difficulty and uncertainty as to its results—it is not easy to see how such a composition can be considered and dealt with as a real burden or *debitum fundi* consistently with the essential and indispensable characteristics of such a right. I can quite understand, however, that parties may by special agreement, or, to use Mr Erskine's expression, by paction, so contract in relation to a composition for an entry, even of singular successors, as to make it a real burden or *debitum fundi*, and whether this has been done in the present instance is a question to which I shall afterwards advert; but in the meantime I am only considering whether it is such *sua natura* independently of special contract or agreement; and for the reasons I have now adverted to I think it is not.

Nor is the view I have taken of this matter without authority to support it. In the case of *Stirling* v. *Ewart*, 4 D. 684, I find that the Lord Justice-Clerk (Hope) expresses his opinion (pp. 715-16), and supports it by cogent reasons, to the effect that the composition for the entry of singular successors is not a casualty of superiority at all, and therefore is not payable out of or a real burden on the lands; and the opinions of others of the Judges, and in particular of Lords Medwyn and Moncreiff, were to the same effect, while none of them expressed an adverse opinion. And on the case going to the House of Lords I find that Lord Cottenham adopted the opinion of the Lord Justice-Clerk (Hope), and accordingly says (3 Bell's Appeal Cases, 249-50)—"For the reasons stated by the Lord Justice-Clerk, there seems to be much ground for holding that the composition was not a casualty of superiority, and was not payable out of the estate." His Lordship then (p. 250) proceeds to explain the grounds upon which he thought so, very much to the same effect as I have already stated them. It is true that Lord Brougham says (p. 241)—in reference to the Lord Justice-Clerk's (Hope) opinion—"I see one learned Judge—the Lord Justice-Clerk—argues at length against its" (the composition for the entry of a singular successor) "being a casualty, on which I give no opinion, for it is not necessary farther than to say that his Lordship's argument has not satisfied me that it is not a casualty, but the point needs not be here settled."

The result then is, that so far as the case of *Stirling* v. *Ewart* is concerned, there is the clear and decided opinion of the Lord Justice-Clerk (Hope), concurred in by others of the Judges in this Court, and of Lord Cottenham in the House of Lords, to the effect that a composition payable on the entry of singular successors is not a casualty of superiority, and in that sense *debitum fundi* or a real burden on the vassal's lands, and that Lord Brougham, while he stated that he gave no opinion on the point, says he was not satisfied with the reasoning of the Lord Justice-Clerk.

But the pursuers founded on the case of the *Edinburgh Gas Company* v. *Taylor* (5 D. 1325) as supporting their contention that the composition of a singular successor is a proper casualty of superiority, and therefore *debitum fundi*. It rather appears to me, however, that the question in that case was not whether a composition for the entry of a singular successor was a casualty of superiority, but whether the parties in that particular case must not, having regard to the terms of the feu-contract there in question, be held to have agreed and transacted on that footing. In other words, the dispute in that case related exclusively to the construction of the agreement or contract of parties, and did not involve the general question as it presents itself here at all. In no other way can I account for the case of *Stirling* v. *Ewart*, although previously decided, not being noticed in the *Gas Company's* case.

The composition for the entry of singular successors is, no doubt, sometimes loosely referred to as a casualty or right of superiority, and it is of that character, but not, as I think, in the sense and to the effect of constituting it a real burden or *debitum fundi* inherent in the superior's reserved right. In particular, I cannot think that when compositions for an entry are spoken of in the passage of Mr Erskine's Institute, which was particularly founded on by the pursuers at the debate (b. 2, t. 5, s. 2), the learned author referred to the case of singular successors; and I think it is plain he did not do so when the rest of the title in which that passage occurs is attended to, for although in that title he enumerates in detail the various rights and casualties of superiority to which he had previously alluded, the composition for the entry of singular successors is not among them. Accordingly, Professor Bell in his Commentaries (vol. i., M'Laren's ed., p. 23) distinctly and unqualifiedly states in regard to a composition for an entry of a singular successor—"This is a payment which is not to be regarded as a feudal casualty, but as a composition resulting out of the statutes by which superiors have been forced to enter creditors and purchasers contrary to the original spirit of the law of feus."

I hold it, therefore, on authority as well as principle, to be free from all reasonable doubt that the composition for the entry of a singular successor is not a casualty of superiority, and is not as such *sua natura debitum fundi* recoverable by poinding of the ground.

The inquiry, however, remains, whether the composition here in question has been constituted *debitum fundi* or a real burden by the special agreement or paction of parties?

In dealing with the case in reference to this inquiry it must be borne in mind that a real burden duly constituted—or, what I hold to be the same thing *debitum fundi*— is entitled to various important privileges of a peculiar and preferential nature, and amongst others to that of poinding the ground. It is only reasonable therefore that such rights should be strictly scrutinised before being sustained.

The nature of the right more immediately in question, and the terms in which it has been constituted, are to be found in article second of the pursuer's condescendence. From the quotation in that article it appears that entry-duties, whether for heirs or singular successors, are expressly mentioned and declared to be "real burdens" on the feu-subjects, and it is then added, that "so often as they shall accresce and become due and payable they may be sued for and recovered as *debita fundi*"—a declaration which is in itself of no importance, because all duly constituted real burdens, whether called *debita fundi* or not, must be such, and so recoverable. And if the entry-money for singular successors in the present instance was capable of being constituted a real burden, I would be disposed, although not without some hesitation and difficulty, to concur with the Lord Ordinary in thinking "that so far as the form of the deed goes it is sufficient." But that the entry-money of a singular successor, even when it arises in the manner in which it does in the present instance, is capable of being made a real burden, regard being had to the essential requisites of such a right, I, in concurrence with the Lord Ordinary, fail to see. According to the feu-contract here in question, as I read it, the entry-money of a singular successor becomes due with interest, not at certain fixed dates, but generally and indefinitely every time a transfer of the subject is made to a purchaser or other party not being the heir of a deceasing vassal. This being so, it would be impossible to ascertain from the public records what number of transfers—the transferees not having completed their titles by registered instrument of sasine—may have taken place, and consequently what might be the amount of debt preferably secured over the subjects. But there can be no real burden of such a nature—that is to say, of a nature that its exact amount, as well as the party to whom it is owing, cannot be ascertained from the titles and the public records. Professor Bell, the highest authority that could be appealed to on the subject, states in his Commentaries (vol. i. of M'Laren's ed., p. 730) that "*Both in the disposition and in the sasine the burden must*," among other requisites, "*be specific in the amount, and in the creditor's name.*" And "this requisite," he adds, "has two objects:—(1) that curators may know the precise amount of the burden; and (2) that they may know whether it be paid or extinguished." The cases referred to by Mr Bell in support of this doctrine are conclusive as to its soundness. And the doctrine is stated to the same effect by Mr Erskine in his Institutes (b. ii. t. 3, s. 50); by Professor More at p. 195 of his Notes on Stair; and by Mr Duff at p. 194 of his Treatise on Feudal Conveyancing.

It is obvious, however, that the duties which might be owing for the entry of singular successors in such a case as the present, although called real burdens, and declared to be recoverable as *debita fundi*, are awanting in one at least of the indispensable requisites of such rights, viz., a specification of their amount. As remarked by the Lord Ordinary, "The entry-money does not become due at periodical fixed periods, as in the case of a feu-duty or ground-annual, but at times which are uncertain and cannot be ascertained from the record. Hence, if it were held that the entry-money formed a real burden on the subjects, it might, and indeed would, on every sale be charged with burdens of which the record would contain no notice."

Nor do I see that it is any good answer to this view of the matter to say that payment of the entry-moneys of singular successors has been made a condition of the feu-right, and as such entered in the reddendo clause, for I am not aware that this can convert into a *debitum fundi* or real burden something which is awanting in the essential and indispensable characteristics of that right. There is no authority, so far as I know, for such a view, while, on the contrary, it appears to me to be opposed not only to the authorities to which I have referred, but also to various decisions pronounced in conformity with these authorities. Thus the cases of *Stenhouse* v. *Innes & Black*, (M. 10,264, *Allan* v. *The Creditors of Richard Cameron*, M. 10,265), are illustrations of the principle that conditions although appearing not only in the reddendo but also in the dispositive clause and precept of sasine, and so entering the public record, cannot be dealt with as real burdens if not otherwise constituted in conformity with the established rules on the subject. And in the case of *The Tailors of Aberdeen* v. *Coutts* (1 Robinson's Appeals, p. 296), which received a great deal of consideration both in this Court and on appeal in the House of Lords, one of the questions was, What was necessary to render payment of a sum of money a real burden binding on singular successors? In reference to this question Lord Corehouse in this Court—and his views were adopted and given effect to in the House of Lords —after dealing with servitudes and some other prestations which occasionally occur in feu-charters, remarked (pp. 310 and 311 of House of Lords report)—"But there is another class of cases, as already mentioned, where the words must be much more precise and specific to make the obligation binding on singular successors. Thus, where the disponee is burdened with the payment of a sum of money, whether it be reserved to the superior himself or made payable to a third party, if the amount of the sum is not exactly specified in the investiture it is unavailing, for the law of Scotland does not admit any indefinite burden attaching to lands." If this statement of the law is applicable to the money in question due for the entry of singular successors—and I can see no sufficient reason for holding that it is not—it necessarily follows that the alleged debt cannot be dealt with as a real burden, or *debitum fundi*, so as to warrant poinding of the ground.

The relief or entry-duties payable by heirs stand in a different position, for they are undoubtedly casualties of superiority, and their

amount can always be ascertained without much difficulty; but as no question has been raised in this case in regard to the entry-money of heirs, it is unnecessary to notice that matter farther.

The entry-money of singular successors, which alone is now in question, is not only not a casualty of superiority, but even if it had been such in the ordinary case it could not be so considered in the present instance, having regard to the very peculiar terms in which it here arises. It will be observed that by the feu-contract it is declared "that all purchasers or disponees of the vassals in the said subjects, or any part thereof, shall be obliged to enter by a charter of resignation from the said Henry Raeburn, or his heirs and successors, and be infeft thereupon within the space of six months from the date of their respective purchases, and that although their authors be alive at the time, any law or practice to the contrary notwithstanding." And it will be further observed that it is also declared by the feu-contract that the "several sums of entry-money shall become payable as often as they become due, whether heirs or singular successors or disponees shall demand the writings necessary for infefting themselves or not." Not only, therefore, is the entry-money due by singular successors not in itself a casualty of superiority, but it is in the present instance essentially different in its character from such a casualty, inasmuch as it is made payable within six months, with interest from the date of the purchase, whether the fee be full or not.

I am therefore, in the circumstances, and for the reasons I have stated, of opinion that the interlocutor of the Lord Ordinary reclaimed against is well founded, and ought to be adhered to. And I have only to add that I should very much regret if the decision of the Court in this case should be such as to detract from the efficiency and completeness of the much-prized system of public registration of titles to land in Scotland.

Lord Gifford—I have felt this case to be both an important and a difficult one, and the weight due to the opinion of the Lord Ordinary and the difference of opinion which has arisen in the Inner House has led me to give renewed and very careful consideration to the pleas of parties.

The question is, Whether under the terms of the feu-contract of 8th November 1820, entered into between Sir Henry Raeburn of St Bernards and his son Henry Raeburn junior, a stipulation for certain duplicands of feu-duty on the occurrence of certain events is or is not a real burden on the subjects and recoverable by an action of poinding the ground?

The stipulation in the contract is that the vassals, in whose right the present defenders now are, shall not only pay a yearly feu-duty for the subjects, but that heirs and singular successors shall enter within six months after succession or purchase, and shall pay a duplicate of the feu-duty over and above the current feu-duty of the year, and that every time the property changes hands, whether the heirs or successors demand charters or not, and which entry-money, whether demanded or not, shall bear interest from the lapse of the said six months, and shall constitute a real burden on the subjects feued.

There is little doubt—indeed I think there is no doubt whatever—as to the meaning and intention of the contracting parties. The superior stipulated for and the vassal agreed for himself and his successors that every time the feu changed hands, whether by the death of the proprietor or by purchase or transfer, there should be an entry with the superior, altogether irrespective of whether the subjects were in non-entry or not, and that at every such change of property, or within six months thereof, there should be paid to the superior a double of the feu-duty over and above the feu-duty of the current year: that this duplicand should bear interest whether demanded or not, or whether a charter was taken or not; and the parties specially agreed that these entry-moneys or duplicands of the feu-duty and interest thereon should be real burdens on the subjects feued, and should be recoverable as *debita fundi*. I do not think it was disputed at the bar that this was the real intention of the parties and the real meaning of the contract into which they entered. Indeed, the contract is quite explicit and unambiguous, and the real question, and the only question, is, Whether this contract is to receive full effect in law, or whether there is anything in its form or in its substance which prevents it from receiving effect in whole or in part, or which will prevent the Court from giving the legal remedies for which the parties stipulated, and which they intended should be conferred?

I agree with the Lord Ordinary that there is nothing in the mere form or words of the feu-contract, or in the manner in which it is expressed, or the place where its declarations and stipulations occur, which would prevent the Court from giving effect to them. I refer of course to the declarations making the entry-moneys on the entry of heirs and singular successors real burdens on the subjects. No doubt it was ingeniously argued that a declaration constituting sums of money real burdens should on feudal principles be inserted in the dispositive clause, and not in any other or subsequent clause of the deed. But I am of opinion that even this technical rule is sufficiently complied with when in the dispositive clause itself, as here, reference is made to the subsequent conditions of the deed, for it will be observed that even in the dispositive clause the subjects are not conveyed purely and absolutely, but only and always "under the conditions, provisions and declarations hereinmentioned," and in the obligation to infeft and precept of sasine, which are essential clauses, and which often embody the whole conditions of the grant, the reference is repeated—"But always with and under the burden of the feu-duty, and other conditions and prestations herein mentioned"—that is, mentioned in the deed. If therefore it was competent in law to create the entry-moneys stipulated for real burdens upon the subjects feued, I think that has been effectually done by the terms and form of the instrument in question. And so far I am at one with the Lord Ordinary, for the only ground upon which he has disallowed the real burden is, not that there is anything imperfect or insufficient in the form of the deed or of the infeftments following thereon, but on the sole ground of the uncertainty of the amounts sought to be secured, or rather of the

uncertainty as to the time of the occurrences upon which the sums are demandable. This point of uncertainty, which really occasions the only difficulty in the case, I shall consider immediately.

The general rule as between superior and vassal—and confining myself strictly to feudal principle—which in this matter is still in full force is, that all the reserved rights of the superior—that is, all rights reserved by the charter—everything which he does not expressly give to the vassal—remain effectually secured by the superior's own infeftment, and are therefore real rights—*debita fundi*—available against the subject into whose hands soever the mere vassal's right, called the *dominium utile*, may happen to come. The superior's original infeftment remains intact and uninjured notwithstanding the granting of the feu. In short, the *dominium utile* is a mere burden upon the superior's ampler right, which is the higher right of property, and is known in feudal language as the *dominium directum.*

In general, therefore, it is really superfluous for the parties to a feu-contract to stipulate that the superior's rights, or any of them, shall constitute *debita fundi* or real burdens. They are so by the very nature of the grant, and by the right of property inherent in the superior. Whatever the superior has not given to the vassal remains the property of the superior under his original infeftment, not because it has been given to him by the vassal, for the vassal never had it to give, but because it has been retained by the superior as part of his original *dominium.* In no case, therefore, as between superior and vassal, is it the vassal who by any act of his constitutes a burden on the superior's lands. The vassal can never do that. It is simply that the superior retains as his own what was always his; and because all his rights in the lands were real, what he retains must necessarily be so too, unless indeed by the terms of the contract it is expressly given up. Accordingly all our institutional writers in treating of the relation between superior and vassal make this plain. A feu-right is a division of the property—So much given—the *dominium utile;* and so much retained—the *dominium directum.* To take as an example—Mr Erskine, after explaining that the rights retained by a superior are either fixed or casual, and in considering the superior's right to the feu-duty, says (Erskine, b. ii. t. 5, s. 2)—"Superiority carries likewise a right to the yearly feu-duty payable by the vassal to the superior in his reddendo, and because this and all other rights of superiority, where the superior is not in possession of the lands themselves, are *debita fundi* or real burdens affecting the fee, an action for poinding the ground lies at his instance for the payment of them against all singular successors in the land."

Indeed, all through the institutional writers I do not find any distinction taken between the fixed rights of the superior—that is, those which are precisely defined in the grant—and his casualties—that is, those which depend on the occurrence of uncertain events. No doubt the amount of the one class can be told by merely reading the charter; the amount of the other depends upon extrinsic facts. But when once these facts are ascertained, the superior's right to his casualties seems to rest upon the same footing as his right to his fixed duties, namely, on his original infeftment of property.

No doubt in a feu-contract, as in every other contract, there may be mere personal stipulations or obligations which will give rise merely to personal actions and not to real actions, and this will always depend upon the true construction and meaning of the contract itself; but there is really no question about this in the present case, for it cannot be denied that both parties intended and stipulated that the duplicand of the feu-duty to become due every time the property changed hands should be as much a real burden available to the superior as the feu-duty itself; and, as already mentioned, if this is a legal stipulation, the parties have used proper and habile words in a legal and competent manner to effect their purpose.

But it is said, on the part of the defenders, that while all this may be quite true as to proper and established legal casualties made incident by the law itself to the relation of superior and vassal, it must go no further, and cannot be extended to the composition exigible by a superior on the entry of a singular successor. It was argued, and argued with great force, that the composition exigible upon the entry of a singular successor is not a feudal casualty at all; that it formed no part of the original relation between superior and vassal; that the superior originally was not bound to receive a singular successor at all; and that the so-called composition for an entry, which was a year's rent of the subjects, was a mere compensation which the Legislature awarded to the superior when they took away his right to refuse an entry, and compelled him to receive a singular successor in the same way as he might have been compelled to receive an heir.

I do not in the least deny the force of the argument that composition from a singular successor was not originally a casualty of superiority. The *dicta* and views of Lord Justice-Clerk Hope, confirmed as they are to some extent in the House of Lords (although Lord Brougham stated that he was not satisfied with the reasoning of the Lord Justice-Clerk), are deserving of the very greatest weight, and as an antiquarian question these views to a large extent command assent; but according to the present law as between superior and vassal, original feudal notions having in the course of centuries undergone considerable modification, it can hardly be disputed that composition on the entry of a singular successor is exceedingly like and exceedingly analagous to relief-duty payable upon the entry of an heir; and the remarks of Lord President Boyle in the case of *The Edinburgh Gas Company* v. *Taylor*, 5 D. 1327, are important. He says—"In ordinary legal phraseology at the present day composition on the entry of singular successors is styled a casualty;" and Lord Mackenzie concurs in this.

But I am of opinion that all difficulty arising from the controversy whether composition on the entry of singular successors is or is not a feudal casualty created by the law, is superseded by the express terms of the present feu-contract, for I think that the whole entry-moneys stipulated for in the feu-contract are legally and effectually made part of the reddendo—that is, they are part of the pecuniary payments which were the conditions on which the feu was granted. They all occur in what would be the reddendo clause of a feu-charter—that is, they occur in the vassal's obligation in the feu-contract, which corresponds

to the reddendo in a proper feu-charter, and they form the condition of the grant just as much as the feu-duty itself does. The condition of the grant is paying therefor (the vassals)—(1st) an annual feu-duty of £25, 4s.; (2d) a duplicand of the said feu-duty at the entry of each heir or singular successor, declaring that heirs shall enter within six months of the decease of their predecessor, and that singular successors shall enter within six months from the date of their respective purchases, whether their authors be alive or not—that is, whether the fee be full or not; and that these duplicands shall bear interest whether demanded or not, or whether a charter be taken or not.

Now, I am of opinion that this is a perfectly legal reddendo, not struck at either by any law or by any principle of the feudal system, at least prior to the recent Conveyancing Act of 1874. No doubt the entry-moneys stipulated for, though precisely fixed in pecuniary amount, are uncertain as to the frequency of their recurrence; but this does not make these casualties illegal. All the original feudal and well-known casualties were uncertain,—the casualty of ward in ward-holding depending upon the duration of an heir's minority—the casualty of recognition—the casualty of marriage, which was a *debitum fundi.* The casualty of relief payable upon the entry of an heir was always uncertain; and so on. Uncertainty of occurrence is no objection to any of the reserved rights of superiority, and I am aware of no instance where any objection was sustained on this ground. It is true that by the recent Conveyancing Act of 1874 it is prohibited (section 23) in all future feus to stipulate for any casualty or uncertain payment to be paid on the succession of an heir or of a singular successor, and the only legal stipulation is permanently to increase the feu-duty or to stipulate for a fixed periodical payment becoming due at stipulated and certain times. But this recent statute, which alters the law, shows the entire legality of such stipulations prior to the Act, and all hardship is removed, for casualties exigible under old feus are declared redeemable in the manner stipulated in the Act itself.

In 1820, therefore, and down to 1874, I think there can be no doubt that it was perfectly lawful for the superior to stipulate for, and the vassal to agree, that duplicand feu-duties should be exigible on every change in the proprietorship, and I am inclined to think that without any clause declaring these real burdens they would be so by the very nature of the grant; but I see no reason why the express clause declaring these duplicands to be *debita fundi,* which has entered the vassal's sasine and the public records, should not receive effect, and either view is sufficient for the decision of the present case.

It is to be observed also that the stipulation for entry-moneys in the reddendo embraces the entry of heirs as well as that of singular successors. The casualty on the entry of heirs is called relief, and is admittedly a proper casualty, and was always a *debitum fundi,* but its occurrence is equally uncertain as the occurrence of a transfer to a singular successor; and it would be very strange if the uncertain casualty of relief is a *debitum fundi*—and admittedly it is so—and yet the taxed composition due on the equally uncertain occurrence of a sale or purchase could not be made a real burden, although the taxed composition was fixed at precisely the same sum as the taxed relief-duty.

But the anomaly would not stop here, for the taxed relief-duty in the present case is a double of the feu in addition to the current feu-duty, whereas the legal relief-duty—that is, the relief-duty due by law apart from stipulation, was only a single feu-duty in addition to the current feu—so that the defender's argument, if well-founded, would necessarily lead to this, that one-half of the taxed relief-duty would in this case be a *debitum fundi,* and the other half would not. I cannot face a result like this. All the objections as to uncertainty of occurrence which are urged against the duplicand due on a sale are equally applicable to the same duplicand due on the death of a vassal, and the relief-duty due in this case is not the feudal casualty, but is of greater amount, and can only stand on the special stipulation.

I am therefore of opinion that under the special terms of this feu-contract, and under the titles completed in virtue thereof, the taxed entry-moneys stipulated for by the superior, and undertaken to be paid by the vassal, are *debita fundi* validly and effectually secured upon the subject itself without prejudice to any personal obligations which the contract contains. The question arises solely between the superior and persons deriving right as purchasers from the vassal, and who cannot be in a better position than the vassals themselves. The conditions of the feu were fully known to the defenders as purchasers, and there is not even the semblance of hardship in carrying out the contract according to its fair reading, and, I think I may add, according to its obvious and honest construction.

It follows that the action of poinding the ground is well founded, and that unless the entry-moneys, which are admittedly past due, be paid with interest, the diligence of poinding the ground must proceed, and for this end the pursuers are entitled to decree as concluded for.

LORD JUSTICE-CLERK—The provisions of the feu-contract on which this question turns are set out at length on the record, and I need not recapitulate them. The clause which is the subject of discussion is one of not unusual style, by which the sums payable to the superior at the entry of heirs and singular successors are fixed or taxed at a duplicand of the feu-duty over and above that payable for the current year. The contract provides that the heir or singular successor shall enter within six months, and the provision is fenced with an irritancy of their respective rights in case of failure. It is also provided that these stipulations shall apply whether the necessary writs are demanded or not. And lastly, these sums are declared real burdens on the subjects, "to be sued for and recovered as *debita fundi.*" The original feu-contract is dated in 1820. The superiority of a portion of the lands which were then feued has come by singular titles to be vested in the present pursuers. In 1869 the *dominium utile* of that part of the original feu was vested in Mrs Margaret Forrest, wife of James Graham, of Ann Street, Edinburgh. The husband had a right of liferent over the subjects, which he renounced, and Mrs Graham in 1869 executed a *mortis causa* disposition of the property in favour of her eldest son and two other children. She

died in 1872, and the subjects remained in non-entry without any title being completed or any step being taken by the superior until 25th February 1875, when the disponees recorded their disposition, and of the same date sold the property to the defender, who recorded his disposition on the 17th May 1875. Thus by virtue of the recent statute the disponees under both deeds were constructively entered with the superior, but no settlement with the defender's authors had been made or apparently demanded of the entry-money due in respect of their respective entries. The pursuers now desire to hold the lands liable both for the sum due by the defender for his own entry and for that due for the entry of Mrs Grahame's disponees, and have raised this action of poinding the ground for the purpose of making both claims effectual. The defender, it seems, has never raised any question as to his own proper debt, but disputes his liability for that of his authors, and he objects to the competency of the action in respect that neither of the sums in dispute are *debita fundi*, or have effectually been created real burdens on the land. The Lord Ordinary has sustained this plea, holding that these sums are not effectually created real burdens, in respect of the uncertainty of their amount.

It appears to me that there are two questions involved in this controversy. The first is, Whether the stipulations in question constitute an integral part of the feudal grant? The second is, Whether they constitute only a collateral personal contract, and have been effectually created real burdens in the land? If they are part of the reddendo of the contract, and are of the substance of the feudal relation constituted by it, then they are not real burdens on the vassal's right, but are qualifications or limitations of the burden created on the superior's right by the feu-contract, for a feu-right contained in a contract or charter leaves everything not granted in the person of the superior, and therefore, if this be the true nature of these provisions, they did not require to be constituted real burdens in the sense applicable to collateral personal stipulations. The Lord Ordinary seems to have addressed himself solely to the second of these questions, but I think that both require to be considered.

If the sum due on the entry of Mrs Grahame's disponees were to be considered as due by an heir, I should have had little difficulty in holding that it was an essential condition of the feudal investiture, and so a sufficient warrant for such an action. It is certain that relief—that is the fine payable by an heir for his entry—is without any stipulation in the feu-right *debitum fundi*, and although the law will imply no further right on this head that a duplicand of the feu-duty, when there has been no contract as to its amount the right is not weaker but stronger when there is such a contract. I am of opinion that such a stipulation as the present, inserted in the reddendo of the feu-right, is as much part of the feudal investiture as the feu-duty is, and may be made effectual and recovered by the same remedies. I know of no authority to the contrary.

It may, however, be maintained, and has not been disputed in argument, that the disposition by Mrs Grahame, although a mere nomination of heirs, yet constitutes the disponees singular successors, who, but for the taxation in the feu-contract would be bound to pay a year's rent. I shall consider the case on this footing.

It is maintained by the defender that the case of composition payable by a singular successor in respect of an entry differs from that of relief payable by an heir; that the last is a proper feudal casualty, while the first is nothing but a personal debt, the price, viz., of an entry by the superior, and the superior consequently cannot use the remedy of poinding the ground to recover it unless it has effectually been created a real burden.

This has been long a controverted point, and has never been a subject of direct decision. The authorities are conflicting, and such as they are amount to expressions of opinion only on the part of the Judges and commentators which have never been directly applied. The strong opinion expressed by Lord Justice-Clerk Hope in the case of *Stirling* v *Ewart*, apparently concurred in by Lord Moncreiff and by Lord Cottenham in the House of Lords, was not the ground of the decision, but was doubted by many of the Judges, including Lord Brougham in the House of Lords. Lord Medwyn was of opinion that the composition was payable by an appriser or adjudger, although not so as regarded a singular successor. The question was fully argued towards the end of last century in the case of *Lockhart* v. *Denholm* (M. 15,027), but the judgment there also went on another *ratio*, and was greatly questioned in subsequent cases. A very able judicial elucidation of the general subject is to be found in the instructive opinions of Lord Meadowbank and Lord Glenlee in the case of *Cockburn Ross* in 1815 (June 1815, F.C.), but these great feudalists differed materially in their views. The notes attributed to Lord Elchies on Lord Stair's Institutes contain a dissertation on the chapter of his work on "Superiority and its Casualties," from which Lord Glenlee quotes largely in the opinion to which I have referred, and which opens up the whole of this subject, and illustrates the distinctions between different casualties and the mode of enforcing them, more satisfactorily, as I think, than any of the other text writers. Of the others, Mr Ross, in his Lectures, lays it down that composition is undoubtedly a casualty of superiority—ii. 302. Mr Robert Bell in his treatise on Titles (309, last edition) says it is not; and that a poinding the ground is not competent in order to recover it. His brother Professor Bell takes the same view in his Commentaries, but expresses himself with more reserve in his Principles (728), where he lays it down that if the superior deliver the charter to a singular successor "the entry may be completed by sasine, and then the claim to a composition becomes merely personal—there is no poinding of the ground for it."

If this were the question which we had to decide, I should be prepared to give effect to the law expressed in the passage last quoted. After a singular successor or an appriser or adjudger has once obtained his charter, a poinding of the ground for the composition would seem to be incompetent, as it is certainly without example, either in the case of a purchaser or a creditor. But this result may not necessarily import that the claim itself is not a casualty of superiority;

and Mr Erskine's dictum on this subject seems too unqualified. Until the singular successor obtains his charter he has no feudal relation with the superior at all; and when he obtains it he thereafter holds the lands under a title which neither expresses nor implies any such obligation. The superior could refuse to deliver the charter until the year's rent was paid, and if he did deliver it and entered the vassal voluntarily it might be presumed that the superior's demand was paid or departed from as far as the tenure was concerned, even although the personal obligation of the singular successor remained. Whether the recent Conveyancing Statute, which has deprived the superior of his former remedy of withholding the charter until payment, has made any difference in this respect, I need not enquire.

It does not, however, follow that composition is in its nature a right entirely extrinsic to the feudal relation. The Statute of Geo. II. (20 Geo. II. cap. 50) does not specify the terms on which the superior is to give the entry. It simply reserves to the superior his existing rights by virtue of his title of superiority, a right which had grown up by long-continued practice before the date of that statute. The recent Conveyancing Statute of 1874, both in the interpretation clause and throughout, comprehends composition under the generic name of casualty. When therefore this feu-charter deals with the matter of composition it cannot be said that the subject is merely a debt extrinsic to the relation of superior and vassal.

But however these questions may be solved, the present arises under conditions which are different, and to some extent reversed. Here the obligation in question is made in terms part of the reddendo of the feu-right, and on all feudal principles the reddendo is a condition of the right itself, and binding on all vassals who enter. The superior's right is neither a merely personal debt on the one hand, nor a burden on the vassal's right on the other. It is simply a reservation by the superior of part of his own radical estate, which, as the vassal never obtained any right to it, remains with him, and does not form part of the burden on the superior's right which the feu-contract created.

It is said that these provisions in regard to the entry of a singular successor amount to no more than a taxation of a claim which is in its own nature personal and not feudal, and that its nature is not altered although the amount may be regulated by these provisions. I am not insensible to the force of this view, and my opinion has varied in regard to it. But on full consideration I do not think that it can be sustained, and on this head I concur in Lord Gifford's opinion, and shall simply add one or two remarks.

It appears to me impossible to separate these provisions from the essence of the right obtained by the vassal. They were provisions very material to the right acquired, and while they limit it in one respect, they extend it in another, from what the law would otherwise imply. By limiting the payment by a singular successor to a duplicand of the feu-duty, they enable the vassal to obtain a higher price for his right and the disponee to enter on payment of a smaller fine. I presume I may assume that under the terms of this feu-contract the singular successor is entitled to enter on payment of a double of the feu-duty instead of a year's rent, not only against the superior who granted the right, but against his singular successor in the superiority. If this right is not part of the investiture, but rests only on a personal contract, it is difficult to see how the pursuers, who are singular successors in the superiority, should be bound by their author's personal contracts. The only right which the defender or his authors had to an entry on these terms is the stipulation in the feu-contract, and that stipulation is qualified by the condition that all these sums of entry-money shall be recovered as *debita fundi*. The singular successor can only obtain the benefit of those clauses because they constitute a condition of the right which he has acquired, and form an integral part of his own investiture.

In this view, it can be of no consequence that this, like all casualties of superiority, is payable at uncertain times. It is not less a condition of the feudal grant. The same feature is found in all the contingent rights of superiority, which are called casualties simply because they do not fall due at fixed or certain periods. And whether composition in its strict sense be a casualty of superiority or no, this payment under the present feu-right is in no lower position.

The question regarding what are or what are not feudal casualties has arisen only in regard to payments or prestations not expressed in the feu-right, and has always related to their operation at law apart from specific paction. In regard to specific payments or prestations conditioned in the charter itself, the only question which can arise is, not whether they are casualties, and so real without entering the feu-rights, but whether they are or are not essential qualities of the right itself, and form integral parts of the feudal relation; or whether they are only collateral personal obligations, which, if not made real by appropriate provisions, only bind the parties to the contract and their respective heirs.

Prima facie, at all events, the payments or prestations stipulated in the reddendo of the charter are essential conditions of the feu. They may consist of personal service, or payments in money, or in payments in kind, but as long as they truly constitute the direct equivalent for the right conferred by the superior they are *debita fundi*, in respect that they are part of the superior's estate, of which he has not divested himself. The only question therefore raised here is, Whether the fine payable by a singular successor on his entry, which is here conditioned to be a double of the feu-duty, is of that character? for if it be, then of course all the conditions of the right which attach to it are of the same character.

I have been unable to come to any other conclusion than that this stipulated payment, which overrides the common law in favour of the singular successor, is inherent in the right itself, and is not merely a collateral personal contract.

The Court recalled the Lord Ordinary's interlocutor, and in respect that payment had been made by the defenders, found it unnecessary to grant decree in terms of the conclusion for payment.

Counsel for Pursuers (Reclaimers)—Kinnear—Rankine. Agents—Romanes & Simson, W.S.

Counsel for Defenders—M'Laren—Strachan. Agent—T. J. Gordon, W.S.